Supreme Court, U.S.
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In the Supreme Court of the United States

GARY E. HELLER, PETITIONER

v.

URBANO C. ALEJO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED

Under the "favorable termination" rule of *Heck* v. *Humphrey*, 512 U.S. 477, 486-487 (1994), a person seeking damages for actions that would necessarily imply the invalidity of his conviction or sentence must demonstrate that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." In *Edwards* v. *Balisok*, 520 U.S. 641 (1997), this Court extended that requirement to damages actions arising out of prison disciplinary sanctions resulting in the loss of good time credits.

The question presented here is whether *Heck*'s favorable termination rule may apply when a prisoner's damages action challenges prison disciplinary sanctions affecting the conditions of confinement and not the fact or duration of confinement.

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In the Supreme Court of the United States

No.

GARY E. HELLER, PETITIONER

v.

URBANO C. ALEJO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Gary E. Heller, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 328 F.3d 930. The judgment and opinions of the district court (App., *infra*, 15a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2003. On August 1, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including September 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent, Urbano Alejo, a Cuban, came to the United States in 1980 and was detained by the Immigration and Naturalization Service (INS). While in custody, respondent was convicted of conveying a firearm and then of murdering his cellmate. As a result, respondent was incarcerated at the United States Penitentiary in Marion, Illinois. In that penitentiary, respondent was part of a "pretransfer" program and lived in the prison's "B Unit," which was designed for prisoners and detainees who had "maintained 'clear conduct' during their recent history of incarceration" and were therefore rewarded with "relaxed rules" and the right to work at a cable factory. Inmates in B Unit, however, were subject to strip searches. App., *infra*, 2a-3a.

On August 12, 1994, Corrections Officer Keith Heckler stopped respondent as he was leaving the dinner hall and ordered him to strip. Heckler ordered respondent to hand him his clothes, but respondent instead placed them on a nearby wooden bench. Respondent claims that he didn't understand the command, because Heckler spoke to him in English. (He says he understood the command to strip because it was a command he had heard many times before.) Heckler claims that respondent refused his order to hand him the clothes and that respondent told him, in English, to pick the clothes up himself. App., *infra*, 3a.

Heckler reported the incident to his superior, petitioner Lieutenant Gary Heller, who directed Heckler to write respondent up for refusal to obey an order. After Heckler wrote him up, a short investigation was conducted. Because respondent claimed not to have understood the order, the matter was referred to the prison

disciplinary committee. That committee determined that respondent had willfully disobeyed Heckler's order, and it removed him from the pretransfer program and B Unit. App., *infra*, 3a-4a.

Respondent unsuccessfully appealed to the warden and then filed an appeal with the Bureau of Prisons regional director. That appeal, however, challenged a different disciplinary committee decision unrelated to the strip search incident. App., *infra*, 4a.

2. In September 1994, respondent filed this action in district court, alleging that the failure to give him a Spanish-speaking interpreter when issuing orders to him was a denial of due process; that the failure to address his administrative appeals in Spanish denied him meaningful access to the courts; that he had been harassed because of his Cuban origins and his complaints about prison conditions; and that he had received disproportionate punishment because of his Cuban ancestry. App., *infra*, 4a-5a. In May 1995, the district court dismissed Heckler and all other defendants except petitioner because the complaint failed to allege their personal involvement, and in August 1997, the court granted summary judgment to petitioner on respondent's access-to-the-courts claim. *Id.* at 5a-6a.

The district court allowed discovery to proceed on the remaining claims against petitioner. App., *infra*, 6a. In July 2000, petitioner filed a second summary judgment motion, arguing that respondent's claims arising out of the strip search were barred under *Heck* v. *Humphrey*, 512 U.S. 477, 486-487 (1994), because success on those claims would necessarily imply the invalidity of the underlying disciplinary determination. In November 2000, the district court adopted the magistrate's report and recommendation (App., *infra*, 24a-27a) and dismissed the claims relying on *Heck*. See

App., *infra*, 20a-23a (district court decision). Respondent, the court held, would be allowed to refile his claims if he succeeded in invalidating the result of the disciplinary proceedings. *Id.* at 20a-22a; see *id.* at 6a-7a. The district court noted that, in *DeWalt* v. *Carter*, 224 F.3d 607, 617-618 (2000), the Seventh Circuit had overruled one of the cases the magistrate had relied on to support applying *Heck*'s favorable termination requirement in this context. App., *infra*, 22a n.1. But the district court concluded that *DeWalt* was inapplicable to "the princip[le]s at issue in this case." *Ibid.*

3. The court of appeals affirmed in part and reversed in part. As relevant here, the court of appeals rejected the district court's (and the magistrate's) conclusion that, under *Heck*, the case should be dismissed without prejudice. The court of appeals specifically disagreed with the district court's statement that *DeWalt* was not controlling. *DeWalt*, the court of appeals explained, had concluded "that 'a prisoner may bring a § 1983 claim challenging the conditions of [his] confinement where [he] is unable to challenge the conditions through a petition for federal habeas corpus.'" App., *infra*, 12a (quoting *DeWalt*, 224 F.3d at 613). Thus, *DeWalt* "holds that where a prisoner-litigant challenges only the conditions of confinement, rather than the fact or duration of his confinement, *Heck*'s favorable-termination requirement does not apply, because federal habeas corpus relief is not available." *Ibid.*

Here, respondent's claims arising out of his strip search challenge only the conditions of his confinement. App., *infra*, 12a. Accordingly, the court of appeals held

that those claims are not subject to the favorable termination requirement of *Heck*. *Ibid.*[*]

REASONS FOR GRANTING THE PETITION

The question presented in this case is the same as the first question presented in *Muhammad* v. *Close*, cert. granted, No. 02-9065 (June 16, 2003). Both cases concern whether a Section 1983 or *Bivens* plaintiff challenging only the conditions (and not the fact or duration) of his confinement may be required to satisfy the favorable termination requirement of *Heck* v. *Humphrey*, 512 U.S. 477, 486-487 (1994). In *Muhammad*, the Sixth Circuit answered that question in the affirmative, holding that *Heck*'s favorable termination requirement applies if resolving the Section 1983 action in the prisoner's favor would necessarily impugn the results of prison disciplinary determinations and review proceedings. See No. 02-9065 Pet. App. A2. In this case, the Seventh Circuit reached the opposite result, holding that "where a prisoner-litigant challenges only the conditions of confinement, rather than the fact or duration of his confinement, *Heck*'s favorable-termination requirement does not apply." App., *infra*, 12a; see *id.* at 13a. Because this Court's resolution of *Muhammad* will govern the disposition of this case, the petition in this case should be held pending the decision in *Muhammad* and then disposed of in light of the decision in that case.

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[*] The court also rejected petitioner's argument that the judgment should be affirmed on the alternative ground that he was not personally involved in the strip search incident. The court noted that such a ruling would be a ruling on the merits, unlike the district court's dismissal without prejudice. Petitioner, the court held, was not entitled to expand the relief below without having filed a cross-appeal. App., *infra*, 13a-14a.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Muhammad* v. *Close*, No. 02-9065, and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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SEPTEMBER 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1573

URBANO C. ALEJO, PLAINTIFF-APPELLANT

v.

GARY E. HELLER AND KEITH HECKLER,[1]
DEFENDANTS-APPELLEES

Argued: Feb. 19, 2003
Decided: May 13, 2003

Before FLAUM, Chief Judge, COFFEY and KANNE, Circuit Judges.

KANNE, Circuit Judge.

Prisoner-detainee Urbano C. Alejo was disciplined for failing to obey a federal correction officer's order that was issued in English. Alejo, a Spanish-speaking Cuban national, brought this *Bivens*-style action, alleging various denials of due process based on his nationality and ethnicity. All but one of these claims—that Alejo was unconstitutionally disciplined for his failure to obey an order he could not understand—were dis-

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[1] The docket sheet for this appeal also lists as defendants-appellees K. Murphy, Fernando Castillo, and M.L. Batts. At no time in this appeal has Alejo made an argument that the dismissal of these defendants was in error. These defendants are therefore dismissed with prejudice from this appeal. *See also infra* note 2.

missed for want of prosecution, a ruling that is not challenged here. What is challenged is (i) the district court's *sua sponte* dismissal without prejudice, at the threshold stage, of all but one of the prison-personnel defendants on account of Alejo's failure to allege their personal involvement, and (ii) the district court's subsequent dismissal of the remaining claim against defendant Lieutenant Gary Heller, because that claim necessarily asserted the invalidity of a disciplinary determination that had not previously been challenged. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. HISTORY

Alejo's Background

Alejo fled Cuba for the United States in 1980. Shortly after his arrival, the Immigration and Naturalization Service detained him and placed him in federal custody. Three years later, while in detention, Alejo was convicted and sentenced for conveying a weapon at a federal facility. Thereafter, in 1986, Alejo was convicted and sentenced for killing his cellmate.

During his sentence for murder, Alejo served time at various federal prisons, including the United States Penitentiary at Marion, Illinois ("USP Marion"), where the events giving rise to this action occurred. Alejo has completed his criminal sentence, but remains confined as an INS detainee.

The Incident

While at USP Marion, Alejo was housed in the prison's "B Unit" and was placed in the prison's "pre-transfer" program, a unit and program designated for

those prisoners and detainees who had maintained "clear conduct" during their recent history of incarceration and as a reward received special privileges, such as relaxed rules and the ability to work at a cable factory. As a condition for receiving these privileges, however, B-Unit inmates were subject to random strip searches.

In the afternoon of August 12, 1994, Alejo was stopped as he was leaving the dinner hall by USP Correction Officer Keith Heckler and ordered to strip. Alejo complied. Heckler then ordered Alejo *in English* to hand Heckler his clothes as he removed them. Heckler contends that Alejo refused this order, placing his clothes instead on a nearby wooden bench and telling Heckler *also in English* to pick them up himself.

Alejo denies this, and contends that although he understood Heckler's order to strip—having complied with such orders on occasions too numerous to list—he did not understand what Heckler was ordering him to do with his discarded clothes. It is undisputed that Alejo has difficulty understanding English. In fact, this was apparently known to prison officials at the time of the strip-search incident. A November 1993 prisoner report on Alejo described the extent of his grasp of the English language: "Caberra-Alejo does not speak English in any substantial manner and effective communication is only accomplished by use of an interpreter."

Nonetheless, Heckler reported Alejo's noncompliance to his superior, USP Lieutenant Gary Heller. Heller instructed Heckler to write him up for refusal to obey an order. Heckler did so, and after another lieutenant conducted a short investigation into the incident, which revealed Alejo's defense that he had not understood the

order, the report was referred to the prison disciplinary committee.

Three days later, the disciplinary committee convened to consider the incident report and determined that Alejo had willfully disobeyed Heckler's order. As a result, Alejo was removed from the B Unit and the pretransfer program.

On September 12, 1994, Alejo appealed the disciplinary-committee decision to the prison warden, who denied relief. Alejo then submitted an administrative appeal of the warden's decision to the regional director. But that appeal did not challenge the disciplinary committee's decision regarding the strip-search incident; instead, it challenged an unrelated disciplinary determination arising from a separate incident involving Alejo's possession of a razor blade, which had resulted in Alejo being placed in disciplinary segregation.

The Lawsuit

Rather than further pursuing his administrative appeal of the strip-search incident, on September 14, 1994, Alejo initiated this action by filing a *pro se* complaint written entirely in Spanish. The district court struck the complaint for noncompliance with Federal Rule of Civil Procedure 8(a), granting Alejo leave to refile. On March 27, 1995, Alejo filed his amended *pro se* complaint, written in English.

The amended complaint named Heller and Heckler, as well as various other prison officials, as defendants. But in Alejo's statement of his claim, only Heller is referred to by name. He described the defendants as "Gary E. Heller, and other John Does of the Bureau of Prisons," and accused them of violating his consti-

tutional rights by (i) harassing him on account of his Cuban ancestry and in retaliation for prior complaints about his custodial conditions, (ii) inflicting disproportionate punishment upon him also on account of his Cuban ancestry, and (iii) denying him Spanish-speaking interpreters when issuing orders and preventing him from meaningful access to the courts by refusing to address his administrative appeals written in Spanish.

On May 17, 1995, the district court granted Alejo permission to proceed *in forma pauperis*, but *sua sponte* dismissed Heckler and every other defendant except for Heller from the suit, finding that in his statement of claim, Alejo made no allegation that any of them were personally involved in the events giving rise to the suit. The dismissal regarding the other defendants was granted without prejudice, and the case against Heller was referred to a magistrate judge for further proceedings.

Heller moved for a more definite statement on July 24, 1995, a motion which the district court summarily denied a month later. On January 30, 1996, the district court appointed counsel for Alejo.

A year later, Heller filed a motion seeking dismissal or, alternatively, summary judgment on Alejo's claims, arguing that he was not personally involved in the events at issue and that even if he was, he did not violate any of Alejo's clearly established constitutional rights by advising Heckler to pursue disciplinary charges against Alejo and was therefore entitled to qualified immunity. Because Heller had relied on materials outside of the pleadings, the motion was treated as one for summary judgment.

In his report and recommendation issued June 17, 1997, the magistrate judge recommended rejection of Alejo's First Amendment access-to-the-courts claim and retention of the remaining claims. On August 19, 1997, the district court adopted the report and recommendation in full, granting summary judgment in favor of Heller on the access-to-the-courts claim and denying relief as to the balance of the claims.

For the next three years, the case meandered through discovery and pretrial motions. On July 14, 2000, Heller filed his second motion for summary judgment, claiming that because success on Alejo's claims arising out of the strip-search incident would necessarily invalidate the disciplinary determination resulting from that incident, he was precluded from collaterally seeking damages relief without having first invalidated that determination directly. Heller noted that Alejo had not exhausted his administrative remedies to expunge that incident report or the decision of the disciplinary committee. Heller also reasserted his lack-of-personal-involvement and qualified-immunity arguments. On August 7, 2000, Alejo filed his response to the motion.

The magistrate judge agreed with Heller's position that this Circuit's precedent interpreting the Supreme Court's holding in *Heck* v. *Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), required Alejo to invalidate the disciplinary determination before collaterally attacking it in a *Bivens*-style suit. On September 9, 2000, he recommended the complaint be dismissed. Alejo filed his objections to the magistrate judge's report and recommendation on September 25, 2000.

On November 13, 2000, the district judge adopted the report and recommendation and dismissed without

prejudice Alejo's claims relating to the strip-search incident. The district judge recognized that in a decision issued August 11, 2000, we overruled our prior precedent applying Heck to prisoners who challenge only the conditions of their confinement, *DeWalt* v. *Carter*, 224 F.3d 607, 617-18 (7th Cir. 2000); however, he concluded that the invalidity of that prior precedent was "unrelated to the principles at issue in this case."

Further, the court ordered Alejo to show cause why it should not dismiss for want of prosecution any remaining claims that did not arise out of the strip-search incident. On February 22, 2001, the district court ruled on the show-cause order, finding that for several years Alejo had not mentioned any specific event other than the proceedings relating to the strip-search incident, and therefore the court dismissed without prejudice all remaining claims for want of prosecution. Having then dispensed with all of Alejo's claims, the district court entered final judgment pursuant to Federal Rule of Civil Procedure 58, and Alejo filed a timely notice of appeal.

Alejo's appeal challenges only the dismissal of Heckler for lack of personal involvement[2] and the dismissal of the claim arising out of the strip-search incident against Heller. Neither the grant of summary judgment on the First Amendment claim nor the want-of-prosecution dismissal of any remaining claims not arising from the August 12, 1994 strip-search incident

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[2] Although this order also dismissed prison-official defendants "K. Murphy, Fernando Castillo, Mr. Miranda, Lt. Miliacia, M.L. Batts, Mr. Koillow, and Jesus Navarro," (R. 12) Alejo does not challenge the dismissal of these defendants. Our discussion is therefore restricted to the district court's ruling as applied to Heckler alone.

are at issue here. We restrict our discussion accordingly.

II. ANALYSIS

Heckler's Dismissal

Alejo attacks the district court's *sua sponte* decision—made at the threshold, *in forma pauperis* determination stage—to dismiss the claim against Heckler without prejudice because of Alejo's failure to allege facts sufficient to establish Heckler's personal involvement in the allegedly unconstitutional conduct.

As an initial matter, Heckler argues that Alejo has waived any argument contesting Heckler's dismissal. Heckler's argument is that because he was dismissed *without* prejudice, a ruling which invited Alejo to amend his complaint to add allegations of Heckler's personal involvement, and because Alejo never amended his complaint to include these allegations, we should not now entertain his objections to the district court's prior dismissal.

We have squarely rejected this type of "waiver" argument previously and do so again here. *See Bastian* v. *Petren Res. Corp.*, 892 F.2d 680, 682 (7th Cir. 1990). Alejo argues that the dismissal of Heckler was erroneous—that his amended *pro se* complaint was sufficient to place Heckler on notice of his personal involvement and to state a claim against him, and as a result the complaint against him should not have been dismissed *sua sponte*. Alejo could not have challenged this dismissal on appeal at the time the decision was rendered, because the dismissal of a complaint without prejudice is generally not considered a final, appealable decision. *See id.*; *see also Hoskins* v. *Poelstra*, 320 F.3d 761, 763

(7th Cir. 2003); *Larkin* v. *Galloway*, 266 F.3d 718, 721 (7th Cir. 2001); *Furnace* v. *Bd. of Trustees of S. Ill. Univ.*, 218 F.3d 666, 669 (7th Cir. 2000). A final order was not rendered in this case until the court entered judgment pursuant to Rule 58. And "[w]hen a final decision is appealed, the appeal brings up all previous rulings of the district judge adverse to the appellant." *Bastian*, 892 F.2d at 682 (citing *Asset Allocations & Mgmt. Co.* v. *W. Employers Ins. Co.*, 892 F.2d 566, 569 (7th Cir. 1989)). Thus, this appeal presents Alejo with the opportunity to challenge all of the district court's prior adverse rulings. But if before this appeal Alejo would have amended his complaint in accordance with what he now asserts was an erroneous ruling, he would have abandoned the principal arguments he raises here. *Cf. id.* at 683. Rather than signifying his surrender of the argument raised here, his refusal to amend reflects, if anything, his resolute adherence to it. We now turn to the merits.

This case was filed before the enactment of the Prison Litigation Reform Act of 1996 ("PLRA"). Therefore—pre-PLRA—the court could have dismissed the claim against Heckler only if the court found Alejo's claim to be frivolous or malicious. *See* 28 U.S.C. § 1915(d) (1994); *Walker* v. *Taylorville Corr. Ctr.*, 129 F.3d 410, 412 (7th Cir. 1997) ("[B]ecause [the petitioner's] appeal was filed before April 24, 1996, the effective date of the PLRA, we look to the former version of § 1915(d) to see if the claim was 'frivolous or malicious,' rather than asking in addition whether the proposed complaint failed to state a claim upon which relief can be granted, as the amended § 1915(e)(2)(B) requires."). Which is to say, it must have found that Alejo could "make no rational argument in law or fact to

support his . . . claim for relief" against Heckler. *Williams* v. *Faulkner*, 837 F.2d 304, 307 (7th Cir. 1988), *affirmed sub nom.*, *Neitzke* v. *Williams*, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989).

A plaintiff bringing a civil rights action must prove that the defendant personally participated in or caused the unconstitutional actions. *Duncan* v. *Duckworth*, 644 F.2d 653, 655 (7th Cir. 1981). Thus, even under the pre-PLRA standard of § 1915(d), we have upheld *sua sponte* dismissals by the district court when the plaintiff did not allege personal involvement on the part of the defendant. *See, e.g.*, *Walker*, 129 F.3d at 413 (citing *Whitford* v. *Boglino*, 63 F.3d 527, 530-31 (7th Cir. 1995)).

Here, Alejo's complaint does not allege that Heckler personally participated in or caused any allegedly unconstitutional action.[3] Although he named nine defendants in his complaint, Alejo specifically accused only defendant *Heller* of violating his constitutional rights. Rather than make any personal allegations against Heckler, Alejo accused groups of unknown "John Does" of participating in the allegedly unconstitutional conduct.

Because of the factual circumstances in this case, that phrase is insufficient to allege Heckler's personal involvement. The phrase "John Does" is fatally overbroad in suggesting that an uncertain number of

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[3] We have learned about Heckler's alleged interaction with Alejo during the strip-search incident at issue only by virtue of Heller's substantive motions, which included as exhibits Alejo's disciplinary records, the contemporaneous incident report that Heckler submitted, and Heller's declaration regarding the events. The amended complaint is silent regarding this specific incident and the actors involved.

Bureau of Prisons officials, potentially from every level, participated in denying Alejo his constitutional rights. At the same time, "John Does" is fatally underinclusive, because it indicates that those defendants—other than Heller—who violated Alejo's constitutional rights were unknown to him. In fact, Alejo included Heckler as a named defendant at USP Marion, thus plainly indicating that Heckler was known to Alejo. Because only unknown John Does and Heller were alleged to be personally involved, it follows that Heckler was excluded from the claim.

To the extent that Alejo alleged unconstitutional conduct on behalf of USP officials that he knew and with whom he had personally interacted, he had the burden to name them specifically in his complaint. Absent this, the district court could not infer that Heckler was an unknown John Doe and was personally involved in the allegedly unconstitutional conduct. For this reason, the *sua sponte* dismissal of Heckler was proper.

Heller's Dismissal

In his report and recommendation on Heller's second motion for summary judgment issued September 9, 2000, the magistrate judge found that Alejo's claims arising out of the strip-search incident necessarily implied the invalidity of the disciplinary proceedings resulting from that incident. Citing *Heck* and *Miller* v. *Ind. Dept. of Corr.*, 75 F.3d 330 (7th Cir. 1996), the magistrate judge concluded that Alejo's civil-rights claim would not accrue until the decision to impose discipline had been reversed, expunged, declared invalid, or otherwise called into question. Citing our holding in *Stone-Bey* v. *Barnes*, 120 F.3d 718 (7th Cir. 1997), he

then concluded that rather than staying the case until Alejo successfully challenged the validity of the underlying disciplinary proceedings (a decision that could cause the case to remain on the court's docket in perpetuity should Alejo's subsequent attempts never prove successful), the case should be dismissed without prejudice to allow Alejo to refile the claim at a later date should the disciplinary proceedings be invalidated. *See id.* at 721 (applying Heck's favorable-termination requirement to all decisions by prison disciplinary boards that entail some finding of guilt in adjudicating a disciplinary charge).

The district judge adopted the report and recommendation, holding that *Heck* barred Alejo's *Bivens*-style claim. The district court held that dismissal without prejudice, rather than a stay, was the proper way to dispose of Alejo's suit. In reaching this position, the district court acknowledged that we had recently overruled *Stone-Bey*, *see DeWalt*, 224 F.3d at 618, but noted that the invalidity of the holding in *Stone-Bey* was "unrelated to the principles at issue in this case."

We disagree with that assessment. In *DeWalt*, this court recognized that "a prisoner may bring a § 1983 claim 'challenging the conditions of [his] confinement where [he] is unable to challenge the conditions through a petition for federal habeas corpus.'" *Id.* at 613 (quoting *Jenkins* v. *Haubert*, 179 F.3d 19, 21 (2d Cir. 1999)). In other words, our opinion in *DeWalt* holds that where a prisoner-litigant challenges only the conditions of confinement, rather than the fact or duration of his confinement, *Heck's* favorable-termination requirement does not apply, because federal habeas corpus relief is not available. *See id.* at 617 (citing *Pischke* v. *Litscher*, 178 F.3d 497, 500 (7th Cir. 1999) (holding that

habeas relief is restricted to claims for which the prisoner "is seeking to 'get out' of custody in some meaningful sense"), and *Graham* v. *Broglin*, 922 F.2d 379, 381 (7th Cir. 1991) (stating that if a prisoner is challenging "merely the conditions of his confinement his proper remedy is under civil rights law" and not federal habeas)).

Under *DeWalt*, Alejo's claim against Heller, which arose out of the strip-search disciplinary proceedings that resulted in his removal from the B-Unit and pre-transfer programs, challenges the conditions of his confinement and cannot be barred by *Heck*. The district court's holding to the contrary was therefore erroneous.

Nevertheless, Heller argues that we should affirm the district court's dismissal on other grounds; namely, his summary-judgment arguments that he was not personally involved in the August 12, 1994 strip-search incident and that even if he was, he is entitled to qualified immunity. This Court has unequivocally stated that without cross-appeal, an appellee may not "attack the decree with a view either to enlarging his own rights there under or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *United States ex rel. Stachulak* v. *Coughlin*, 520 F.2d 931, 937 (7th Cir. 1975) (quotations omitted). The district court's dismissal without prejudice pursuant to its belief that *Heck* barred Alejo's claim was not a ruling on the merits, *see Greenwell* v. *Aztar Ind. Gaming Corp.*, 268 F.3d 486, 494 (7th Cir. 2001), *cert. denied*, 535 U.S. 1034, 122 S. Ct. 1790, 152 L. Ed. 2d 649 (2002), whereas a grant of summary judgment on the basis of either of Heller's arguments

would be. Accordingly, Heller seeks to enlarge his rights and supplement the district court's decree with a ruling on the merits that was not reached below. He cannot do this without filing a cross-appeal.

III. CONCLUSION

Because Alejo's complaint did not allege (and in fact precluded) Heckler's personal involvement in the alleged deprivation of Alejo's constitutional rights, the district court's *sua sponte* dismissal of Heckler at the *in forma pauperis* stage was proper. The district court, however, incorrectly decided that Alejo's *Bivens*-style claim against Heller was barred by *Heck*'s favorable-termination requirement. For these reasons, the dismissal of Keith Heckler is AFFIRMED, and the dismissal of the suit against Gary E. Heller is REVERSED and the case is REMANDED for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 94-CV-682-JPG

URBANO CABERRA ALEJO, PLAINTIFF

v.

GARY E. HELLER, ET AL., DEFENDANT

[Filed: Feb. 22, 2001]

JUDGMENT

This matter having come before the Court, the issues having been heard, and the Court having rendered a decision,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff Urbano Caberra Alejo's claims against defendants K. Murphy, Fernando Castillo, Mr. Miranda, Mr. Heckler, Lt. Miliacia, M.L. Batts, Mr. Koillow and Jesus Navarro are dismissed without prejudice;

IT IS FURTHER ORDERED that plaintiff Urbano Caberra Alejo's claims against defendant Gary E. Heller challenging the disciplinary proceedings against him following an August 12, 1994, incident are dismissed without prejudice;

IT IS FURTHER ORDERED that judgment is entered in favor of defendant Gary E. Heller and against

plaintiff Urbano Cabera Alejo on the claims of violation of the First Amendment for deprivation of meaningful access to the Courts by reason of a language restriction on administrative remedy filings; and

IT IS FURTHER ORDERED that all other claims by plaintiff Urbano Caberra Alejo against defendant Gary E. Heller are dismissed without prejudice.

NORBERT JAWORSKI

Date: February 22, 2001 /s/ JUDITH PROCK
JUDITH PROCK
Deputy Clerk

Approved: /s/ J. PHIL GILBERT EOD: 2-22-01
J. PHIL GILBERT
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 94-CV-682-JPG

URBANO CABERRA ALEJO, PLAINTIFF

v.

GARY E. HELLER, ET AL., DEFENDANT

[Filed: Feb. 22, 2001]

ORDER

This matter comes before the Court on the Court's January 22, 2001, order to show cause (Doc. 115). In that order, the Court issued an order for plaintiff Urbano Caberra Alejo ("Alejo") to show cause on or before February 9, 200[1], why the Court should not dismiss any remaining claims in this case for lack of prosecution pursuant to Federal Rule of Civil Procedure 41(b) and the Court's inherent authority to manage its docket.

Alejo responded to the Court's January 22, 2001, order to show cause (Doc. 116) by telling the Court that he did not wish to abandon any claims he raised in his complaint and attaching some documents purportedly showing that defendant Gary E. Heller participated in an incident and that Alejo was almost killed one day. Those documents include an incident report and other

documents relating to the disciplinary hearing following an August 12, 1994, incident. They also include various of Alejo's medical and dental records from November 1990 to January 1992. Alejo does not explain the relevance of those records to any of the claims he raised in his amended complaint.

The Court has reviewed Alejo's response and has found that he has not set forth any issues he intends to pursue that were raised in his amended complaint and that have not already been resolved in this case. First, Alejo's claim relating to the disciplinary hearing stemming from the August 12, 1994, incident report has already been decided by the Court's adoption of Magistrate Judge Frazier's Report and Recommendation (Docs. 109 & 111). Second, the medical and dental records submitted by Alejo do not appear to correspond to any claim he raised in his amended complaint. Although Alejo professes that he has not abandoned any claims he attempted to plead in the amended complaint, a quick review of the file reveals that for years he has mentioned no specific event other than the proceedings relating to the August 12, 1994, incident. In addition, he has not specified any other claims he wishes to pursue in response to the Court's announced intention to dismiss other claims that were pled but have not been pursued or resolved.

Because (1) the Court has resolved all issues contained in the proposed pretrial order, (2) for several years Alejo has not pursued claims he attempted to plead in the complaint other than those already resolved by the Court, and (3) in response to the Court's orders to show cause of December 5, 2000, and January 22, 2001, Alejo has not expressed any intention to pursue any specific remaining claim in this case, the

Court **DISMISSES** any remaining claims without prejudice for lack of prosecution pursuant to Federal Rule of Civil Procedure 41(b) and the Court's inherent authority to manage its docket, and **DIRECTS** the Clerk of Court to enter judgment accordingly.

IT IS SO ORDERED
DATED: February 22, 2001

/s/ J. PHIL GILBERT
J. PHIL GILBERT
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS

No. 94-CV-682-JPG

URBANO CABERRA ALEJO, PLAINTIFF

v.

GARY E. HELLER, ET AL., DEFENDANT

[Filed: Nov. 13, 2000]

ORDER AND ORDER TO SHOW CAUSE

This matter comes before the Court on the Report and Recommendation ("Report") (Doc. 109) of Magistrate Judge Philip M. Frazier recommending that the Court grant in part and deny in part defendant Gary E. Heller's ("Heller") motion for summary judgment (Doc. 106) and dismiss Alejo's remaining claim without prejudice. Plaintiff Urbano Caberra Alejo ("Alejo") has objected to the Report (Doc. 110).

I. Background

Alejo brought this *Bivens* action in September 1994 against Heller, a former lieutenant for the Bureau of Prisons. Alejo alleges that Heller mistreated him and brought disciplinary charges against him because of his Cuban ancestry, his complaints about prison conditions and other reasons. The only claim contained in the

proposed final pretrial order signed by counsel for both parties is a challenge to a August 12, 1994, disciplinary hearing that Alejo claims was initiated because of his Cuban nationality.

The Report found this claim is barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994), because Alejo's success on the claim would necessarily imply the invalidity of the result of the disciplinary proceeding. The Report noted that Alejo's claim will accrue if and when the results of the disciplinary proceeding is invalidated and that he cannot bring this claim prior to such time.

II. Report and Recommendation Review Standard

After reviewing a magistrate judge's report and recommendation, a district court may accept, reject or modify, in whole or in part, the findings or recommendations of the magistrate judge in the report. Fed. R. Civ. P. 72(b). The court must review *de novo* the portions of the report to which objections are made. The district judge has discretion to conduct a new hearing and may consider the record before the magistrate judge anew or receive any further evidence deemed necessary. *Id.* "If no objection or only partial objection is made, the district court judge reviews those unobjected portions for clear error." *Johnson* v. *Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999).

Alejo objects to the factual findings and legal conclusions in the Report. However, none of the objections challenge the conclusion that *Heck* bars Alejo from proceeding with his claim at this time, the essential finding of the Report. Alejo's objection is to the Report's recommendation that the Court stay rather than dismiss without prejudice Alejo's claim.

Because Alejo does not challenge the portions of the Report dealing with the applicability of *Heck* to Alejo's remaining claim, the personal involvement requirement and qualified immunity, the Court, after reviewing the Report for clear error, will adopt those portions of the Report.

The Court will review *de novo* the portion of the Report recommending that the Court not stay the remaining claim in this case but dismiss it without prejudice.

III. Stay v. Dismissal

Alejo's claim should be dismissed without prejudice rather than stayed. It is clear that dismissal without prejudice is the proper remedy when a claim is barred, at least at the time, by *Heck*. *Clayton-El* v. *Fisher*, 96 F.3d 236, 244 n.4 & 245 n.5 (7th Cir. 1996).

Since Alejo's claim is barred by *Heck*, it should be dismissed without prejudice to refiling it if and when the disciplinary action of which Alejo complains is invalidated. This makes sense, for if the result of the disciplinary proceeding is never invalidated, the case would remain on the Court's docket eternally with no hope of resolution. Thus, the Court will adopt the portion of the Report recommending dismissal and declining to recommend a stay.[1]

---

[1] The Court notes that one of the cases cited by the Report, *Stone-Bey* v. *Barnes*, 120 F.3d 718 (7th Cir. 1997), has been overruled on grounds unrelated to the principals at issue in this case. *DeWalt* v. *Carter*, 224 F.3d 607, 618 (7th Cir. 2000). The invalidity of *Stone-Bey* does not change the Court's conclusion to adopt the Report.

VI. Conclusion

For the foregoing reasons, the Court hereby **ADOPTS** the Report (Doc. 109) in it entirety, **GRANTS in part** the motion for summary judgment to the extent that it requests dismissal of Alejo's remaining claim (Doc. 106), **DENIES in part** the motion for summary in all other respects (Doc. 106), and **DISMISSES without prejudice** Alejo's challenge to the August 12, 1994, disciplinary proceedings against him. The Court **DIRECTS** the Clerk of Court to enter judgment accordingly at the close of the case.

It appears from the proposed final pretrial order that the challenge to the disciplinary proceedings was the only remaining claim in this case and that Alejo has abandoned all other claims that have not explicitly been disposed of in this case (Docs. 12 & 53). The Court hereby **ORDERS** Alejo to **SHOW CAUSE** on or before December 1, 2000, why the Court should not dismiss the apparently abandoned claims for lack of prosecution pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.
DATED: November 13, 2000

/s/ J. PHIL GILBERT
J. PHIL GILBERT
District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 94-CV-682-JPG

URBANO CABERRA ALEJO, PLAINTIFF

v.

GARY E. HELLER, DEFENDANT

[Filed: Sept. 11, 2000]

REPORT AND RECOMMENDATION

FRAZIER, Magistrate Judge:

Before the Court is defendant's Second Motion for Summary Judgment (Doc. No. 106), which includes arguments for dismissals. Heller contends that plaintiff has not stated a claim upon which relief could be granted and that summary judgment should be entered in his favor because there are no genuine issues of material fact and he is entitled to judgment as a matter of law. Plaintiff, represented by appointed counsel, opposes the motion (Doc. No. 108).

I. Heck v. Humphrey

Heller claims that plaintiff's remaining claim should be dismissed because his challenge to the validity of an incident report is barred (Doc. No. 107, pp. 2-3).

Final pretrial orders supersede the pleadings and establish the issues to be resolved at trial. *Wilson* v. *Kelkhoff*, 86 F.3d 1438 (7th Cir. 1996). A proposed final pretrial order has been approved by the parties; it accurately reflects the nature of plaintiff's remaining claim.[1] Thus, Heller's argument in favor of dismissal targets the claim set forth in the proposed order: that he initiated disciplinary proceedings on August 12, 1994, intending to discriminate against plaintiff because of plaintiff's Cuban nationality.

Heller relies on a line of cases holding that, when an inmate's success on a § 1983 claim for damages would necessarily imply the invalidity of the result of a disciplinary proceeding, the claim does not arise until the result has been invalidated. *See Heck* v. *Humphrey*, 512 U.S. 477 (1994); *Miller* v. *Indiana Dept. of Corrections*, 75 F.3d 330, 331 (7th Cir. 1996). Plaintiff contends that dismissal would be improper. He suggests that these proceedings should be stayed pending resolution of the underlying litigation (Doc. No. 108).

The initial inquiry is whether judgment in plaintiff's favor would necessarily imply the invalidity of the result of the disciplinary proceedings. If so, plaintiff's § 1983 claim will not accrue until the decision to impose discipline has been reversed, expunged, declared, invalid, or otherwise called into question. *See Heck*, 512 U.S. at 486-87.

Plaintiff contends that Heller directed another correctional employee to write an incident report charging

---

[1] The proposed Final Pretrial Order is attached to this Report and Recommendation. The proposed order has not been entered, primarily because this additional dispositive motion was anticipated.

plaintiff with a specific rule violation: refusing to obey an order. The correctional employee did so, a disciplinary committee found that plaintiff committed the charged misconduct, and sanctions were imposed. There is no indication that the committee's decision to impose discipline was invalidated or set aside.[2] Plaintiff is seeking damages in the amount of $600,000.

I agree with the parties that any finding that Heller initiated disciplinary charges against plaintiff solely on the basis of his Cuban nationality would necessarily imply the invalidity of the result of the disciplinary proceedings. Because there is no indication that the disciplinary committee's decision has been set aside, plaintiff's § 1983 claim has not yet accrued.

The next question is whether this case should be dismissed or stayed pending litigation challenging the validity of the disciplinary proceedings. Any dismissal under the rationale of *Heck* v. *Humphrey* would be without prejudice; plaintiff could refile his § 1983 claim at a later date should the disciplinary proceedings be invalidated. *See Stone-Bey* v. *Barnes*, 120 F.3d 718, 719 (7th Cir. 1997). That is, plaintiff's § 1983 claim is not forever barred, it cannot proceed because it has not accrued. Furthermore, there is no indication that plaintiff is challenging the disciplinary committee's decision in any ongoing litigation or other collateral proceeding. Under these circumstances, dismissal without prejudice is recommended.

---

[2] Documents submitted with the pleadings show that Warden Cooksey denied plaintiff's request for administrative relief on September 12, 1994, and that plaintiff's regional appeal was rejected on October 3, 1994 (See Exhibits attached to Doc. Nos. 1, 6).

II. **Personal Involvement and Qualified Immunity.**

Defendant's remaining arguments in favor of dismissal or summary judgment (Doc. No. 107, pp. 3-7) are not addressed. As the preceding discussion demonstrates, plaintiff's remaining cause of action has not accrued, so any decision on the merits would be premature. Furthermore, these arguments were previously made and rejected (Doc. Nos. 43, pp. 2-3, 7-9; 50, 51, 53). When this Court authorized a second motion for summary judgment, arguments in the nature of reconsideration were not anticipated, and Heller's brief does not show that reconsideration is warranted. *See Bank of Waunakee* v. *Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990) (setting forth reasons that can support a motion for reconsideration). Accordingly, this aspect of Heller's motion is rejected.

CONCLUSION

IT IS RECOMMENDED that Heller's motion for summary judgment (Doc. No. 106) be GRANTED in part and DENIED in part, as follows. Plaintiff's remaining claim should be DISMISSED without prejudice.

SUBMITTED: 9/8/00.

/s/ PHILIP M. FRAZIER
PHILIP M. FRAZIER
United States Magistrate
Judge

Supreme Court, U.S.
FILED
NOV 13 2003
OFFICE OF THE CLERK

No. 03-373

In the

Supreme Court of the United States

GARY E. HELLER,

Petitioner,

v.

URBANO C. ALEJO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ERIK F. DYHRKOPP
Counsel of Record
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QUESTION PRESENTED

In accordance with *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Respondent has sued Petitioner Gary E. Heller, a prison guard, for unconstitutional treatment during his incarceration as a federal prisoner. Respondent's constitutional claims challenge the *conditions* of his confinement as a prisoner, and do not challenge either the *fact* or *duration* of his confinement. In *Heck v. Humphrey*, the Court held that an action brought by a state prisoner under Title 42, Section 1983, of the United States Code would be barred if, in order to be successful, it "would necessarily imply the invalidity of his conviction or sentence," but added that a prisoner's Section 1983 action "should be allowed to proceed" if it would not require invalidation of a criminal judgment. *Heck*, 512 U.S. 477, 487 (1994). Here, the Court of Appeals observed that Respondent's *Bivens* claims against Petitioner "challenge[d] the conditions of his confinement," rather than the validity of any criminal conviction or sentence, and thus could not "be barred by *Heck*." Pet. App. 13a. In advance of the Seventh Circuit's ruling, Petitioner abandoned any argument that *Heck* barred Respondent's claims and instead pressed the Court of Appeals, unsuccessfully, to affirm the dismissal of those claims on other grounds.

Properly formulated, the question presented by Petitioner Heller's petition for a writ of certiorari is:

> Did the Court of Appeals correctly conclude that Respondent's *Bivens* claims against Petitioner Heller was not barred under *Heck*, where Respondent's claims

challenged only the conditions of his confinement and not the fact or duration of that confinement, and Petitioner had abandoned on appeal any argument that *Heck* barred Respondent's claim?

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STATEMENT OF THE CASE

Respondent does not perceive any misstatement of fact in the Petitioner's statement of the case which is material to the question presented, and he provides the following supplemental facts.

Following Respondent's opening brief before the Court of Appeals, which argued that the District Court had erred in holding that *Heck* barred his claims against Petitioner, Heller requested and received two extensions of the time so that the Department of Justice in Washington, D.C. could assist him in preparing his response. Resp. App. 1a-11a. Petitioner subsequently filed a responsive brief which did *not* argue that the District Court had been correct in concluding that *Heck* barred Respondent's claims. Petitioner instead asked the Court of Appeals to affirm the District Court *solely* "on other grounds"—*i.e.*, an alleged lack of personal involvement by Heller in the misconduct charged by Alejo, and qualified immunity. Resp. App. 21a-23a. After the Court of Appeals reversed the dismissal of Alejo's claims against Petitioner, Petitioner did not request rehearing by the panel or *en banc*.

REASON TO DENY THE PETITION

Respondent recognizes that, in *Muhammad v. Close*, No. 02-9065, the Court granted a petition for writ of certiorari on the following question: whether a plaintiff who wishes to bring a Section 1983 suit challenging only the conditions, rather than the fact or duration, of his confinement, must satisfy the favorable

termination requirement of *Heck v. Humphrey*. *Muhammad v. Close*, No. 02-9065 (June 16, 2003). Petitioner, however, erroneously contends that "this Court's resolution of *Muhammad* will govern the disposition of this case." (Pet. Br. 5.)

Petitioner abandoned all arguments relating to *Heck* in the merits brief he submitted to the Seventh Circuit. Although the District Court had relied upon *Heck* to dismiss claims against Petitioner, Heller referred to *Heck* only twice in the "Argument" portion of that brief—(i) as part of a quote from a Magistrate Judge's report, and (ii) in discussing a Seventh Circuit case that had applied *Heck*. Both of those citations appeared as part of a discussion urging an affirmance of the District Court "*on other grounds*." Resp. App. 22a-23a (emphasis added). Heller acknowledged that, under Seventh Circuit caselaw, Alejo's claims were not barred by *Heck*; and he did not contend that the Seventh Circuit's interpretation of *Heck* was erroneous or that it should be overruled. Resp. App. 21a-23a. After the Seventh Circuit handed down its ruling, Petitioner did not seek rehearing to correct any believed error in the application of *Heck*.

Petitioner may not seek relief from this Court on grounds that were abandoned in the Court of Appeals. *See Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (declining to reach question raised for the first time in Supreme Court); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987). Petitioner made the choice—after conferring with the Department of Justice over a two-month period—not to seek affirmance of the District Court on the basis of *Heck*, but instead to seek affirmance solely on other grounds. The fact that this

Court subsequently granted a petition for certiorari in *Muhammad* is not a basis for relieving Petitioner of the consequences of his unsuccessful strategic decision.[1]

CONCLUSION

For the foregoing reason, Heller's petition should be denied.

Respectfully submitted,

ERIK F. DYHRKOPP
Counsel of Record
KARA A. ELGERSMA
SAREN K. PEDERSEN
BELL, BOYD & LLOYD LLC
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Suite 3300
Chicago, Illinois 60602
312.372.1121
Attorneys for Respondent

NOVEMBER 13, 2003

[1] Respondent, of course, contends that the Seventh Circuit properly reversed the dismissal of his claims against Petitioner and reserves his right to so argue in the event Heller's petition is granted

(Any footnotes to trail end of each document)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1573

URBANO ALEJO,
Plaintiff-Appellant,

v.

GARY HELLER, et al.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois

No. 94 C 682

Honorable J. Phil Gilbert
District Judge Presiding

DEFENDANT-APPELLEES' MOTION
FOR EXTENSION OF TIME TO FILE
APPELLEE'S BRIEF

Defendants-appellees, by and through his attorneys, Miriam F. Miquelon, United States Attorney for the Southern District of Illinois, and Gerald M. Burke, Assistant United States Attorney, respectfully requests this Court grant a twenty working day extension of time or until November 12, 2002 for Defendants-appellees to file their brief pursuant to Fed. R. App. P. 26(b).

1. This counsel realizes that extensions of time to file briefs are not favored. See Cir. R. 26. In certain circumstances within five days before the brief is due, however, may lead to an extension. See id. This counsel asserts that his circumstances fall into that narrow category for extensions.

2. This counsel had reserved time sufficient to work on this brief in the thirty (30) days before the brief was due. That time, however, was limited due to the following major projects: (a) preparing for two separate trials on student loan dischargeability actions before the United States Bankruptcy Court for the Southern District of Illinois; (b) working on coordinating a large health care fraud investigation that requires a substantial period of time, the investigation is at a critical stage and involves a long term undercover operation that the parties are attempting to negotiate a joint civil and criminal resolution involving major corporations and very substantial dollar amounts; (c) the Appellants brief raised substantial and important issues such that the undersigned sent the brief to the Appellate Division of the Department of Justice to see if they would assist in the preparation and writing of the brief. At this time he has not received a response to his request.

3. This counsel reasonably believes that the issues raised in the brief deserve complete and thorough briefing, and, as such, has requested assistance from the Department of Justice, Appellate Division. In the absence of such assistance, additional time to file his brief is, unfortunately, required.

4. Only I had working knowledge of the above cases and therefore could not in practicality have other counsel assist. This office and counsel give litigation in the Seventh Circuit top priority.

5. These above facts in paragraph three did not exist earlier or were not, or with due diligence could not have been, known earlier to this counsel.

6. Plaintiff-appellant Alejo will not be prejudiced.

Wherefore, Defendants-appellees respectfully request an extension of twenty working days or until November 12, 2002, within which to file their brief.

GARY E. HELLER
KEVIN MURPHY
FERNANDO CASTILLO
M. L. BATTS
JESUS NAVARRO

Respectfully submitted,

MIRIAM F. MIQUELON
United States Attorney
Southern District of Illinois
GERALD M. BURKE
Assistant United States Attorney
Nine Executive Drive
Fairview Heights, Illinois 62208
(618) 628-3700

PROOF OF SERVICE

I, S. Carr, certify that I am an employee in the Office of the United States Attorney for the Southern District of Illinois and am a person of such age and discretion as to be competent to serve papers. On October 9, 2002, I served: DEFENDANTS-APPELLEES' MOTION FOR EXTENSION OF TIME by placing a copy in a postpaid envelope addressed to the below listed persons and by depositing the envelope in the United States Mail at 331 Salem Place, Fairview Heights, Illinois 62208.

Erik P. Dyhrkopp
Attorney at Law
Bell, Boyd & Lloyd
70 West Madison Street, Suite 3300
Chicago, Illinois 60602

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1573

URBANO C. ALEJO,
Plaintiff-Appellant,

v.

GARY HELLER, et al.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois

No. 94 C 682

Honorable J. Phil Gilbert
District Judge Presiding

DEFENDANTS-APPELLEES' SECOND MOTION FOR EXTENSION OF TIME TO FILE APPELLEE'S BRIEF

Defendants-Appellees Gary Heller and Keith Heckler, by and through their attorneys, Miriam F. Miquelon, United States Attorney for the Southern District of Illinois, and James M. Hipkiss and William E. Coonan, Assistant United States Attorneys, respectfully request that this Court grant a ten-day extension of time to and including November 22, 2002, for Defendants-Appellees to file their appellees' brief pursuant to Fed. R. App. P. 26(b).

1. This counsel, who works regularly on appeals, realizes that extensions of time to file briefs are not favored. See Cir. R. 26. Certain circumstances within five days before the brief is due, however, may lead to an extension. See id. This counsel asserts that his circumstances fall into that narrow category for extensions.

2. Originally, Appellees' brief was due on October 16, 2002. On October 10, 2002, this office requested a first extension of time. On October 10, 2002, this Court granted the motion; Appellees' brief was now due on November 12, 2002.

3. As much, however, as this counsel reserved time to prepare and finish the brief in this matter, the following emergency situations related to this appeal took away that time previously reserved.

4. First, Plaintiff's first argument of his appellant's brief relies on the Seventh Circuit case, DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000), which overruled previous Seventh Circuit precedent. As Plaintiff argues, the district court relied on this precedent which has been overruled. This office has been diligently attempting to work with the Civil Division of the Department of Justice in Washington, D.C., and the relevant agency, the Bureau of Prisons, to resolve this particular issue for the defense of this action. However, the coordination of this matter between the above-mentioned government entities has taken much longer than first anticipated.

5. Second, this office has just re-assigned this appeal to two other Assistant United States Attorneys, James M. Hipkiss and William E. Coonan.

6. This office and counsel give litigation in the Seventh Circuit top priority. The above facts did not exist earlier or were not, or with due diligence could not have been, known earlier to this counsel. The coordination between the Civil Division of the Department of Justice in Washington, D.C., the Bureau of Prisons headquarters, and the Bureau of Prisons local office took longer than expected. This counsel requests ten days as an extension.

7. This motion for extension is not made for the purpose of delay. Plaintiff-Appellant will not be prejudiced.

Wherefore, Defendants-Appellees respectfully request an extension of ten days or until November 22, 2002, within which to file their brief,

Respectfully submitted,

GARY HELLER
KEITH HECKLER

MIRIAM F. MIQUELON
United States Attorney
Southern District of Illinois
JAMES M. HIPKISS
WILLIAM E. COONAN
Assistant United States Attorneys
Nine Executive Drive
Fairview Heights, Illinois 62208-1344

(618) 628-3700

PROOF OF SERVICE

I, Marianne V. Weisenfeld, Legal Assistant, certify that I am an employee in the Office of the United States Attorney for the Southern District of Illinois and am a person of such age and discretion as to be competent to serve papers. On November 8, 2002, I served: DEFENDANTS-APPELLEES' SECOND MOTION FOR EXTENSION OF TIME TO FILE APPELLEE'S BRIEF placing a copy in a postpaid envelope addressed to the below listed persons and by depositing the envelope in the United States Mail at 331 Salem Place, Fairview Heights, Illinois 62208.

Erik F. Dyhrkopp
Kara A. Elgersma
Attorneys at Law
Bell, Boyd & Lloyd LLC
70 West Madison Street, Suite 3300
Chicago, Illinois 60602

MARIANNE V. WEISENFELD
Legal Assistant
United States Attorney's Office

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1573

URBANO C. ALEJO,
Plaintiff-Appellant,

v.

GARY HELLER, et al.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois

No. 94 C 682

Honorable J. Phil Gilbert
District Judge Presiding

DECLARATION OF WILLIAM E. COONAN

I, William E. Coonan, Assistant United States Attorney, declare the following:

1. I am an Assistant United States Attorney. I am aware of the facts surrounding the appeal in this case.

2. This counsel, who works regularly on appeals, realizes that extensions of time to file briefs are not favored. See Cir. R. 26. Certain circumstances within five days before the brief is due, however, may lead to an extension. See id. This counsel asserts that his

circumstances fall into that narrow category for extensions.

3. Originally, Appellees' brief was due on October 16, 2002. On October 10, 2002, this office requested a first extension of time. On October 10, 2002, this Court granted the motion; Appellees' brief was now due on November 12, 2002.

4. As much, however, as this counsel reserved time to prepare and finish the brief in this matter, the following emergency situations related to this appeal took away that time previously reserved.

5. First, Plaintiff's first argument of his appellant's brief relies on the Seventh Circuit case, DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000), which overruled previous Seventh Circuit precedent. As Plaintiff argues, the district court relied on this precedent which has been overruled. This office has been diligently attempting to work with the Civil Division of the Department of Justice in Washington, D.C., and the relevant agency, the Bureau of Prisons, to resolve this particular issue for the defense of this action. However, the coordination of this matter between the above-mentioned government entities has taken much longer than first anticipated.

6. Second, this office has just re-assigned this appeal to two other Assistant United States Attorneys, James M. Hipkiss and William E. Coonan.

7. This office and counsel give litigation in the Seventh Circuit top priority. The above facts did not exist earlier or were not, or with due diligence could not

have been, known earlier to this counsel. The coordination between the Civil Division of the Department of Justice in Washington, D.C., the Bureau of Prisons headquarters, and the Bureau of Prisons local office took longer than expected. This counsel requests ten days as an extension.

8. This motion for extension is not made for the purpose of delay. Plaintiff-Appellant will not be prejudiced.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct. Executed on November 8, 2002.

WILLIAM E. COONAN
Assistant United States Attorney

No. 01-1573

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

URBANO C. ALEJO,
Plaintiff-Appellant,

v.

GARY HELLER and KEITH HECKLER,
Defendant-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois
Case No. 94 C 682
Honorable District Judge J. Phil Gilbert

BRIEF OF DEFENDANTS-APPELLEES GARY HELLER AND KEITH HECKLER

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Southern District of Illinois

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Of Counsel:

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Attorney Advisor
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Argument

I. Defendant Gary Heller recognizes that the holding of DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000), is now the law of this circuit in its analysis of the issue of whether Alejo's Bivens claim is barred, but this Court can affirm the judgment of the district court on other grounds 15

II. This Court should affirm the district court judgment in favor of defendant Gary Heller on the grounds of lack of personal involvement and qualified immunity 17

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* * *

SUMMARY OF THE ARGUMENT

Plaintiff-Appellant Urbano C. Alejo filed an action seeking damages relating to his allegations that numerous correctional officials retaliated against him because he was Cuban by preparing a false incident report. The district court properly found for the defendants. Therefore, this Court should affirm the district court's judgment.

Argument I

Defendant recognizes that the holding of DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000), is now the law of this circuit in its analysis of the issue of whether Alejo's Bivens claim is barred, but this Court should affirm the judgment of the district court on other grounds.

Argument II

This Court should affirm the district court's judgment in favor of defendant Gary Heller on the grounds of lack of personal involvement and qualified immunity.

Argument III

The district court properly dismissed defendant Keith Heckler without prejudice at the in forma pauperis stage when the pro se plaintiff failed to allege any personal involvement on the part of defendant Heckler. Furthermore, plaintiff Alejo waived any challenge to this dismissal without prejudice because he failed to file an amended complaint to cure any defects within the six-plus years before the entry of final judgment

ARGUMENT

I. Defendant Gary Heller recognizes that the holding of DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000), is now the law of this circuit in its analysis of the issue of whether Alejo's Bivens claim is barred, but this Court can affirm the judgment of the district court on other grounds.

In his report and recommendation, adopted by the district court in its entirety, the magistrate judge recommended the dismissal of Alejo's claim without prejudice. The magistrate judge relied "on a line of cases holding that, when an inmate's success on a § 1983 claim for damages would necessarily imply the invalidity of the result of a disciplinary proceeding, the claim does not arise until the result has been invalidated. See Heck a Humphrey, 512 U.S. 477 (1994); Miller v. Indiana Dept. of Corrections, 75 F.3d 330, 331 (7th Cir. 1996)." (P1. App. A015). This Court's standard of review of the district court's dismissal is de novo. Duffy v. United States, 966 F.2d 307, 310 (7th Cir. 1992).

Alejo argues that this Court should reverse Heller's dismissal by virtue of DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000). (Appellant's Brief, at 13-16). In DeWalt, this Court held that the prisoner's claim for damages for loss of his prison job could not be barred because the prisoner challenged only the conditions of confinement rather than the fact or duration of his confinement. Id. at 613, 616-17.

In DeWalt, this Court also stated that "the Supreme Court never has addressed whether Heck's "favorable termination" requirement bars a prisoner's challenge under § 1983 to an administrative sanction that does not affect the length of confinement." 224 F.3d at 616. Because of the open question, the Court felt able to analyze the concurring and dissenting opinions in Spencer v. Kemna, 523 U.S. 1 (1998), to determine that five Supreme Court justices now hold the view that a 42 U.S.C. § 1983 action must be available to challenge constitutional wrongs where federal habeas is not available. DeWalt, 224 F.3d at 617 n. 5.

Defendant Heller recognizes that the holding of DeWalt is now the law of this Circuit. fn3 However, regardless of the Court's decision on this issue, the Court can affirm the judgment of the district court on other grounds, as discussed in the next argument.

Finally, Alejo represented by counsel, did not raise the DeWalt argument before the district court. DeWalt was decided on August 11, 2000, almost a month before the magistrate judge's report and recommendation was filed. However, in his objections filed on September 25, 2000, Alejo did not reference DeWalt, nor attempt to argue that Heck should not be applied to his case. (R. 110; Pl. App. A089-A092). When the district court cited DeWalt and its belief that the case did not affect the issues of Alejo's case, Alejo made no attempt to have the court reconsider the issue. He waited until the appeal to first present his argument on the application of DeWalt without first giving the district court an opportunity to address it.

* * *

CONCLUSION

Defendants-Appellees Gary Heller and Keith Heckler respectfully request that this Court affirm the district court's judgment.

Respectfully submitted,

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Footnotes

fn3 However, Defendant Heller notes the case of Huey v. Stine, 230 F.3d 226 (6th Cir. 2000). In Huey, decided after and citing DeWalt, the Sixth Circuit stated:

> Although Spencer may cast doubt upon the universality of the "favorable termination" requirement, we will continue to follow the Supreme Court's directly applicable precedent and "leave to the Court 'the prerogative of overruling its own decisions.'" (citations omitted).

Huey, 230 F.3d at 230.

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No. 03-373

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Supreme Court of the United States

GARY E. HELLER, PETITIONER

v.

URBANO C. ALEJO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondent does not dispute that the decision below specifically addressed and resolved the first question presented in *Muhammad* v. *Close*, cert. granted, No. 02-9065 (June 16, 2003). In that case, this Court granted the petition for a writ of certiorari to decide, *inter alia*, whether a prisoner who challenges "only the conditions, rather than the fact or duration, of his confinement must satisfy the favorable termination requirement of" *Heck* v. *Humphrey*, 512 U.S. 477, 486-487 (1994). In the decision under review in *Muhammad*, the Sixth Circuit answered that question in the affirmative, holding that *Heck* applies whenever a judgment in the prisoner's favor would impugn the results of prison discipline proceedings, whether or not the fact or duration of confinement are at issue. 02-9065 Pet. App. A2. In this case, the Seventh Circuit reached the opposite result, holding that

"where a prisoner-litigant challenges only the conditions of confinement, rather than the fact or duration of his confinement, *Heck*'s favorable-termination requirement does not apply." Pet. App. 12a; see *id.* at 13a.

Respondent argues that, notwithstanding the identity of the legal issues, this Court should not hold the petition pending *Muhammad* because (according to respondent) the *Heck* issue was abandoned in the court of appeals. Br. in Opp. 2. But neither the district court nor the court of appeals found abandonment. Granting summary judgment to petitioner, the district court invoked the favorable-termination requirement of *Heck*, holding that it applies with equal force to conditions-of-confinement cases. Pet. App. 21a, 22a & n.1 (adopting magistrate's recommendation); *id.* at 25a-26a (magistrate's recommendation). Reversing the district court's judgment, the court of appeals addressed the same issue and held that *Heck* applies only to cases involving the fact or duration of confinement. *Id.* at 12a-13a. Given that both decisions below expressly addressed and resolved the issue, it is difficult to see how it can be deemed "abandoned."

Respondent's contrary argument seems to rest on the fact that petitioner, confronted with on-point Seventh Circuit precedent declaring that *Heck* does not apply to conditions-of-confinement cases like this one, "acknowledged" that circuit precedent precluded *Heck*'s application here. Br. in Opp. 2. But petitioner's admission that circuit law foreclosed his argument does not constitute abandonment of the issue. Rather, by specifically identifying the issue for the court of appeals with supporting and contrary authority, Gov't C.A. Br. 16-17 & n.3 (Resp. Br. App. 22a-23a, 25a n.3)—prompting the court of appeals to address the issue with specificity in its decision—petitioner preserved the issue for potential

review in this Court. Respondent's implicit contention that petitioner was also required to present to the court of appeals an argument squarely foreclosed by circuit precedent not only lacks legal basis, but defies both the principle of stare decisis and the duty of candor owed to the courts. In any event, whether petitioner abandoned an argument *in the court of appeals* is at most an issue *for the court of appeals* to resolve following remand (if any) from this Court in light of the decision in *Muhammad*.[1]

This Court, of course, will not ordinarily "decide questions *neither raised nor resolved* below." *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (emphasis added) (citing *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992)). But that rule has no application where, as here, the legal issue was specifically identified to the court of appeals and the court of appeals unmistakably resolved it. For the same reason, respondent's reliance (Br. in Opp. 2) on *Beck* v. *Washington*, 369 U.S. 541 (1962), is misplaced. In that case, this Court declined to address an issue that had *neither* been pressed *nor* passed upon in the state supreme court. In particular, the Court declined to address an equal protection argument that "was never properly presented to" the state courts, *id.* at 550, and that was not "actually decided by the Washington Supreme Court," *id.* at 553. *Beck* nowhere suggests that this Court will decline to review an issue the party identified to the court of appeals and that the court

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[1] Respondent, moreover, is ill-positioned to argue forfeiture. Respondent never contested *Heck*'s applicability before the magistrate or the district court, raising that issue instead for the first time on appeal. See Pet. App. 22a (respondent "does not challenge the portions of the report dealing with the applicability of *Heck*"); Gov't C.A. Br. 17 (Resp. Br. App. 23a).

of appeals resolved, much less that the Court will decline to hold a petition raising such an issue pending decision in another case.[2]

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be held pending decision in *Muhammad* v. *Close*, No. 02-9065, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2003

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[2] Respondent similarly errs in relying (Br. in Opp. 2) on *City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987) (per curiam). In that case, the issue was neither raised before nor resolved by the court of appeals. See *id.* at 259 (The Court does "not believe that [the court of appeals] pursued the extraordinary course of considering this issue—which petitioner had not even *raised* in its arguments to that court."). In *Kibbe*, moreover, the petitioner sought to challenge jury instructions, where she had not merely failed to object to them, but had specifically requested them. The Court thus explained that "Rule 51 of the Federal Rules of Civil Procedure provides that '[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict,'" and noted that "there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested." 480 U.S. at 259.